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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 426

STATE OF OHIO, EX REL. VAAD HACHINUCH HACHAREDI (TRADITIONAL EDUCATIONAL COUNCIL),
Appellant,

vs.

EDWIN C. BAXTER, WM. C. DUNLAP, SAMUEL E. KRAMER, FRED A. PEASE AND NORMAN KRICHBAUM, AS MEMBERS OF THE CITY PLANNING COMMISSION OF THE CITY OF CLEVELAND HEIGHTS, OHIO,
Appellees

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

STATEMENT OF APPELLEES AGAINST JURISDICTION, INCLUDING MOTION TO DISMISS APPEAL AND AFFIRM JUDGMENT.

G. E. HARTSHORN,
HOWELL LEUCK,
Counsel at Law.

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STATEMENT OF APPELLEES AGAINST JURISDICTION, INCLUDING MOTION TO DISMISS APPEAL AND AFFIRM JUDGMENT.

Now come Edwin C. Baxter, Wm. C. Dunlap, Samuel E. Kramer, Fred A. Pease and Norman Krichbaum, as Members of the City Planning Commission of the City of Cleveland Heights, Ohio, Appellees, under authority of Rule 12, paragraph 3 of the Rules of this Court, and file this statement against jurisdiction, and at the same time move this Honorable Court for an order to dismiss the appeal and affirm the judgment of the Supreme Court of Ohio for the following reason:

The judgment of the Supreme Court of Ohio *does not draw into question the validity of a statute of any state* on the

ground of its being repugnant to the Constitution of the United States, as is asserted by Appellant.

Absent such a showing, this Court clearly has no jurisdiction under the sections of the Judicial Code set forth in Appellant's Statement as to Jurisdiction.

Appellant in its Statement as to Jurisdiction does not directly allege that a statute of the State of Ohio is drawn into question. It merely states that *a certain order of the Planning Commission of the City of Cleveland Heights,* a Municipal Corporation in the State of Ohio, is repugnant to the due process and equal protection clauses of Section 1 of the 14th Amendment of the Constitution of the United States. It is further asserted by Appellant that said Order is "Legislative in nature."

In view of this Court's extension of the meaning of "statute" to cover a Municipal ordinance, or even a decision of a board or commission, legislative in character, acting under authority of a state statute, it is encumbent upon Appellant to show that said Order of the Commission is legislative in nature, that is, that it has the attributes of legislation.

It appears from the pleadings and the record that the Council of the City of Cleveland Heights, acting under authority of Section 8366-7, *et seq.* of the Ohio General Code, duly enacted a comprehensive zoning ordinance, known as General Ordinance No. 2337, of the kind upheld in *Village of Euclid, Ohio* v. *Ambler Realty Co.,* 272 U. S. 365, 47 Sup. Ct. 114, 71 L. Ed. 303, 54 A.L.R. 1016, as is admitted on page 5 of Appellant's statement as to jurisdiction. *The validity of the ordinance itself has not been attacked in this case.* Only the Order of the Planning Commission is under attack.

The ordinance has divided the city into use districts, termed respectively U-1, U-2, U-3, U-4, U-5, U-6, U-7 and U-8.

The uses of property permitted in class U-1 districts are described as follows in Section 3 of the ordinance:

"*Class U-1 Uses (Single Family House).*

"(1) Single family dwelling.

"(2) Church, public or parochial school, public library, public museum. Private club except a club the chief activity of which is a service customarily carried on as a business. Community center building, philanthropic or eleemosynary institution other than a penal or correctional institution. Hospital sanitarium or boarding home for invalids other than insane or feeble minded. Public park, public playground, public recreational building, water tower or reservoir.

"(3) Farming. Non-commercial greenhouses, nursery truck garden."

Without going into detail, Section 3 of the ordinance permits in general, the following uses of property:

U-2—Two family dwelling.

U-3—Apartment house, hotel, boarding or rooming house, fraternity house.

U-4—Bank, office, studio, telephone exchange, retail stores.

U-5—Restaurant, theatres, police station, gasoline station, garage, repair shop, etc.

U-6—Subject to obtaining special permits, billboards, warehouse, ice manufacture, bottling works, laundry, dry cleaning, bowling alley, storage yard, etc.

U-7—Subject to obtaining special permit, greenhouse, cemetery, correctional institution, etc.

U-8—Prohibited uses are manufacturing and industrial operations not otherwise permitted, veterinary hospital, junk yard, explosives, storage, wholesale products market, etc.

Class U-1 uses are, of course, permitted in all use districts in the city.

We are particularly interested in Subdivision (2) under Class U-1 uses which applies to *Parochial Schools.*

Section 4 of the ordinance modified Subdivision (2) of Class U-1 uses, pertaining to churches, parochial schools, and the like, as follows:

> ***"Section 4, Single Family House District.***
>
> In a class U-1 district no building or premises shall be used and no building shall be erected which is arranged, intended or designed to be used, for a class U-2, U-3, U-4, U-5, U-6, U-7 or U-8 use. In a class U-1 district no building or premises shall be used and no building shall be erected which is arranged, intended or designed to be used except for a class U-1 use. In any part of a class U-1 district that is within a class A-1 district, no building shall be used and no building shall be erected which is arranged, intended or designed to be used as a semi-detached single family dwelling or double house. On a corner lot a double house may, however, be erected providing the two single family dwelling in such double house do not front on the same street.
>
> (2) In a class U-1 district no building shall be used and no building shall be erected which is arranged, intended or designed for a use enumerated in subdivision two (2) of class U-1 uses, unless such dwelling is located:
>
> (1) On a lot already devoted to a use enumerated in said subdivision, providing said devoted use is not a "non-conforming" use.
>
> (2) On a lot fronting on a portion of a street between two intersecting streets in which portion there exists premises devoted to a class U-7 use.
>
> (3) On a lot immediately adjoining or immediately opposite on the other side of the street from a class U-4 or U-5 district, or

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(4) On a lot determined by the City Planning and Zoning Commission after public notice and hearing to be so located that such building will in the judgment of the City Planning and Zoning Commission substantially serve the public convenience and welfare, and will not substantially and permanently injure the appropriate use of neighboring property."

Hence, it is apparent from the ordinance that Parochial schools are by no means barred from the City of Cleveland Heights. First, they are permitted in districts U-2, U-3, U-4, U-5, U-6 and U-7. Secondly, they are permitted even in a U-1 district on a lot already devoted to such uses. Third, they are permitted on a lot fronting on a portion of a street between two intersecting streets in which portion there exists premises devoted to a class U-7 use. Fourth, they are permitted on a lot immediately adjoining or immediately opposite on the other side of the street from a local retail store (U-4) or a commercial building of the type mentioned under class U-5. Fifth, they are permitted on a lot determined by the City Planning and Zoning Commission, after public notice and hearing, to be so located that such building will in the judgment of the City Planning & Zoning Commission substantially serve the public convenience and welfare, and will not substantially and permanently injure the appropriate use of neighboring property.

In this proceeding Appellant attempted to use the premises in question for a parochial school on the ground that such use would substantially serve the public convenience and welfare and would not substantially and permanently injure the appropriate use of neighboring property; but this application was denied.

Does such denial by the City Planning & Zoning Commission rise to the dignity of a statute? Does it rise to the dignity even of an Order of a state board or commission

"legislative in nature," as contemplated in cases cited by the Appellant in its Statement as to Jurisdiction?

First, we point out that the City Planning & Zoning Commission is not a State board; it is a *Municipal Commission.*

Secondly, *the Commission's function is not to legislate.* The Commission does not set up the use districts. The City Council has done that. The Commission's sole function in this particular case is merely to determine whether the public convenience and welfare would be served by granting the particular application and whether there would be a substantial and permanent injury to the appropriate use of neighboring property. Its function, we submit, is *purely administrative, not legislative.* It is a *fact-finding function.* All the Ohio Courts had to decide in this case was whether or not the Commission abused its discretion when it failed to find the facts requested by Appellant, namely, that the use of the premises in question in a single house district as a parochial school would substantially serve the public convenience and welfare, and would not substantially permanently injure the appropriate use of neighboring property.

We cite *New Orleans Water Works Company* v. *Louisiana Sugar Refining Co.*, 125 U. S. 18, 8 Sup. Ct. 741, 31 L. Ed. 607, as an authority against jurisdiction here. In that case, the Supreme Court of the United States dismissed a writ of error (now called Appeal) from the Louisiana Court on the ground that no state legislation was involved. The Plaintiff held an exclusive franchise from the State of Louisiana to supply the City of New Orleans and its inhabitants with water, provided, however, that the City Council should not thereby be precluded from granting to any person or corporation "contiguous to the river" the privilege of laying pipes for his own use. The Council subsequently

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granted such a right to lay pipes from its factory to the river to the Louisiana Sugar Refining Co. Plaintiff contended in the State courts and in this Court that this was not contiguous to the river and that the action of the Council impaired the obligation of contract in violation of the Constitution of the United States. The State courts held against the Plaintiff which then attempted to appeal to this Court. The Supreme Court of the United States held that the action of the City Council was not a statute or legislation such as would permit the granting of the Writ of Error. The ground for the decision was that the action of the City Council, even though in the form of an ordinance, was not state legislation, *but was purely administrative.* The Court said at *125 U. S. 31:*

> "But the ordinance now in question involved no exercise of legislative power. The Legislature, in the charter granted to the plaintiff, provided that nothing therein should be so construed as to prevent the city council from granting to any person or persons, contiguous to the river, the privilege of laying pipes to the river, exclusively for his or their own use. The Legislature itself thus defined the class of persons to whom, and the object for which, the permission might be granted. All that was left to the city council was the duty of determining what persons came within the definition, and how and where they might be permitted to lay pipes, for the purpose of securing their several rights to draw water from the river, without unreasonably interfering with the convenient use by the public of the lands and highways of the city. The rule was established by the Legislature, and its execution only committed to the municipal authorities. *The power conferred upon the city council was not legislative, but administrative,* and might equally well have been vested by law in the mayor alone, or in any other officer of the city. N. O., M. & T. R. Co. *vs.* Ellerman, 103 U. S. 166, 172 (26:1015, 1017); Day *v.* Green, 4 Cush. 433, 438. The permission granted by the city

> council to the defendant Company, though put in the form of an ordinance, was in effect but a license, and not a by-law of the city, still less a law of the state. If that license was within the authority vested in the city council by the law of Louisiana, it was valid; if it transcended that authority, it was illegal and void. But the question whether it was lawful or unlawful depended wholly on the law of the State, and not at all on any provision of the Constitution or laws of the United States."

Just as the City Council's action in the case above cited was not legislative, so the action of the Cleveland Heights Planning & Zoning Commission was not legislative but was purely administrative.

WHEREFORE Appellees respectfully submit that this Court has no jurisdiction of this case on appeal, and further pray that the appeal be dismissed and that the judgment of the Supreme Court of Ohio be affirmed.

Respectfully submitted,

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